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No. ____

In The
Supreme Court of the United States

CITY OF SPARKS,

Petitioner,

v.

STEVEN C. WHITE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the First Amendment requires a governmental entity to allow the sale of artistic creations constituting "speech" in the public fora to the same extent it must allow "pure speech" in the public fora?

Do paintings, prints, photographs, digital images, sculptures, engravings, metal art, blown glass objects, jewelry and other artistic creations always constitute "speech" under the First Amendment for purposes of sale in the public fora?

Whether the First Amendment contains inherent standards to determine whether an artistic creation constitutes "speech?"

PARTIES TO THE PROCEEDINGS

The parties to this proceeding include the City of Sparks, a municipal corporation of the State of Nevada, and Steven C. White, an individual.

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INTRODUCTORY PRAYER

The Petitioner respectfully requests that a writ of *certiorari* be granted to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on August 29, 2007.

OPINIONS AND JUDGMENTS BELOW

The Order of the United States District Court for the District of Nevada (Appendix B), issued on August 5, 2004, is reported as 341 F.Supp. 2d 1129 and has been included in the Appendix on pages 12a - 41a. The Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A), issued on August 29, 2007, is reported as 500 F.3d 953 (9th Cir. 2007) and has been included in the Appendix on pages 1a - 10a. The Order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Petition for Rehearing *En Banc* (Appendix C), issued on December 4, 2007, is unreported and has been included in the Appendix on page 42a - 43a.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on August 29, 2007. A timely Petition for Rehearing *En Banc* was denied on December 4, 2007. This petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides, in pertinent part: "Congress shall make no law... abridging the freedom of speech...".

STATEMENT OF THE CASE

In the entire history of this nation, this Honorable Court has not explored the balance between a governmental entity's power to regulate business on public property within its jurisdictional boundaries and an individual's First Amendment right to sell artistic merchandise in a public forum. This case presents an excellent opportunity for the Court to clarify an extremely ambiguous area of law which affects every governmental entity in the nation, as well as the entire populace.

Respondent Steven C. White is an itinerant artist who earns a living by setting up an easel on a city's sidewalks and in parks and selling his paintings to passersby who take an interest in his work. While many of White's paintings appear to be unexceptional nature scenes, White subjectively believes that his paintings convey, among other messages, the message that human beings are driving their spiritual brothers and sisters, the animals, into extinction (A13a - 14a).[1]

Petitioner City of Sparks, Nevada has a policy which prohibits the sale of merchandise in its parks

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[1] Numbers in parenthesis preceded by the letter "A" refer to pages in the Appendix attached hereto.

and limits sales in its redevelopment area known as Victorian Square to those vendors obtaining permits under Chapter 5.59 of the Sparks Municipal Code. Sparks policy makes a "First Amendment" exception to those rules which allows the sale of merchandise in its parks and Victorian Square of items, including artwork, that have been determined by a special committee of city employees to fall within *Gaudiya Vaishnava Society v. City and County of San Francisco,* 952 F.2d 1059, 1063 (9th Cir. 1991), *cert. denied*, 504 U.S. 914 (1992) (extending First Amendment protection to "the sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message" and to the sale of merchandise where verbal or written speech in those categories is inextricably intertwined with the sale) (A24a - 25a). The committee makes a determination whether the merchandise carries or conveys a qualifying message in one or more of those four categories based on broad dictionary definitions of those words, which are to be liberally construed. If the committee determines that the merchandise qualifies under *Gaudiya Vaishnava Society*, the merchandise can be sold in the city parks or Victorian Square without a business license or other permit, subject only to rules imposed on all other users. If the committee determines that the merchandise does not have any qualifying message, an administrative appeal and judicial review are available.

White filed suit and subsequently filed two motions for summary judgment making facial and overbreadth challenges to Spark's "First Amendment" exception on the grounds *inter alia*, it was an unconstitutional prior restraint. White also requested the District Court to

adopt the holding in *Bery v. City of New York,* 97 F.3d 689, 696 (2nd Cir. 1996) that certain visual art (specifically, paintings, photographs, prints and sculptures) "always" communicated some idea or concept and were therefore the equivalent of "speech" entitled to "full" First Amendment protection. The city opposed based on the limited (not "unbridled") discretion of the committee to determine only whether merchandise, or verbal or written statements inextricably intertwined with the sale of merchandise, contained or conveyed a qualifying message, that the city's policy was content-neutral, did not comprise a prior restraint, was narrowly tailored to serve a significant governmental interest and left open many alternative channels for communication.

The District Court granted summary judgment to White, but only to the extent that his paintings qualified for "full" First Amendment protection under *Gaudiya Vaishnava Society* (A 29a - 30a). The District Court declined to extend its ruling beyond protecting White's submitted paintings and rejected White's request for a ruling adopting *Bery* (A28a - 29a). The District Court also concluded that Spark's "First Amendment" exception was an unconstitutional prior restraint (A32a - 36a), by finding that the dictionary definitions (i.e., of the words religious, political, philosophical and ideological) used in the city's policy were not objective criteria for qualifying or disqualifying a piece of artwork (A34a - 35a).

Petitioner appealed to the Ninth Circuit, which found that "To the extent that visual art is inherently expressive, *Gaudiya Vaishnava Society* is inapplicable." (A6a). However, the Ninth Circuit did

not adopt the rationale of the Second Circuit in *Bery* that visual art was "always" communicative and therefore entitled to "full" First Amendment protection, but instead limited its ruling to an artist's original paintings (A7a). Indeed, it expressly reserved the question (in fn.4, A7a) whether any painting not conceived and painted by the original artist was fully protected under the First Amendment.

The Ninth Circuit set out a materially different standard in Petitioner's case than it had expressed in *Gaudiya Vaishnava Society*, and for that reason the Court did not find it necessary to analyze Sparks' arguments that the use of dictionary definitions sufficiently limited official discretion to avoid creating a risk of censorship (fn. 5, A9a).

REASONS FOR GRANTING THE PETITION

Petitioner City of Sparks respectfully submits that this case presents a golden opportunity for the Court to define the scope of the First Amendment in relation to the sale of merchandise in the public fora. Throughout the history of this nation, this Court has never defined the prerequisites for merchandise to be sold in a traditional public forum as the equivalent of "speech" under the First Amendment.

Governmental entities, faced with the uncertainty of the law and with potential liability for First Amendment violations, as well as proponents and opponents of various causes and interests, and artists, sculptors and others who create visual art, must currently speculate as to the extent of their rights. Worse, that speculation cannot be based on existing

precedent because most Circuits have no law on the subject and the law in the two Circuits that have rendered comprehensive opinions on the subject is conflicting and in a constant state of flux. The resultant lack of definition of First Amendment rights, coupled with the potential liability of governmental entities based on an uncertain and ever-changing set of legal rules, should prompt this Court to resolve this intolerable situation.

I. IMPRECISE TERMINOLOGY FROM CENSORSHIP CASES HAS BEEN INARTFULLY APPLIED TO DEFINE THE TYPES OF MERCHANDISE THAT CONSTITUTE "SPEECH"

"Protected vs. Fully Protected"

The words and terms "shielded," "protected," and "constitutionally protected" have generally been used by this Court in the context of censorship cases, whereas the terms "fully protected" and "full constitutional protection" have generally been reserved to describe rights associated with "pure speech". Unfortunately, a significant number of lower court decisions have inartfully confused the terms by automatically applying the censorship "protection" standard to the question whether such merchandise qualifies as "speech," without any analysis of whether the merchandise is communicative to any degree. There is a pressing need for clarification by this Court of those terms in order to prevent the expansive terms used in censorship cases from being misapplied to cases involving the sale of merchandise.

"Expressive" vs. "Message Bearing"

In the decisions relating to censorship of "expressive activities," the word "expressive" has no boundaries and includes virtually any audio, visual or other type of expression, whether or not communicative of any concept or idea. A lengthy list of cases granting constitutional protection from censorship to such "artistic expression" and "expressive conduct" is in the District Court's Order (A26a - 27a). Petitioner concurs that the First Amendment should be expansively interpreted to prohibit most censorship of expression. However, Petitioner submits that more than mere "artistic expression" or "expressive activity" is needed to convert merchandise into "speech" whose sale is entitled to "full" First Amendment protection. The additional quantum necessary is some type of a "message."

II. THE DEARTH OF DECISIONS FROM THIS COURT ON THE FIRST AMENDMENT'S RELATIONSHIP TO THE SALE OF MERCHANDISE IN THE PUBLIC FORA IS RESULTING IN SUCCESSIVE CONFLICTING OPINIONS IN THE CIRCUITS

A. Ninth Circuit

The earliest decision interpreting the First Amendment's application to the sale of merchandise in the public fora was the three-judge decision in *Gaudiya Vaishnava Society v. City and County of San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1991), *cert.*

denied, 504 U.S. 914 (1992). In that case, the District Court permanently enjoined enforcement of a city ordinance that prohibited five nonprofit organizations from selling (in the public fora) merchandise which constituted or conveyed a statement carrying a religious, political, philosophical or ideological message relevant to the purpose of the organization. In affirming that decision, a three-judge panel of the Ninth Circuit noted that the case was one which may also involve a combination of merchandise and "pure speech" used during the sale of the merchandise, and modified the permanent injunction to also prevent enforcement of the ordinance if it would prohibit the sale (in the public fora) of merchandise which was "inextricably intertwined" with "pure speech" carrying a religious, political, philosophical or ideological message. The Court relied upon *Riley v. National Federation of the Blind of North Carolina,* 487 U.S. 781 (1988) and *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989) as standards to determine whether sales of merchandise are "inextricably intertwined" with First Amendment speech. On appeal, the Ninth Circuit concluded that a proponent had a First Amendment right to sell merchandise which qualified as message-bearing under either standard. *Gaudiya Vaishnava Society*, 952 F.2d at 1064. Due to the variety of merchandise being sold by the nonprofit organizations, the *Gaudiya Vaishnava Society* Court did not limit its ruling to merchandise characterized as being within the visual arts – all merchandise could qualify for "full" protection under the First Amendment if it, or "pure speech" associated with its sale, carried or conveyed a "core" First Amendment message falling within the

four categories of religious, political, philosophical or ideological.

On this Petitioner's appeal, the Ninth Circuit made a case-specific ruling that original paintings by the [original] artist were so inherently "expressive" that they constituted the artist's "speech" and were therefore entitled to "full" First Amendment protection. In so holding, the Court obviated any need to first find that the original paintings conveyed any protected message. However, the Ninth Circuit's decision applied only to original paintings, and the primary holding of *Gaudiya Vaishnava Society* – that the merchandise itself, or pure speech "inextricably intertwined" therewith, must carry or convey a core "First Amendment" message to be sold as "speech" in a public forum – survived unscathed as to all other merchandise, including other visual artwork.

The requirement of *Gaudiya Vaishnava Society* that merchandise or speech associated with its sale contain or convey a qualifying message to be fully protected "speech" entitled to be sold in a public forum was upheld in *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1107 (9th Cir. 2003), *cert. denied*, 540 U.S. 1110 (2004); *Perry v. Los Angeles Police Dep't.*, 121 F.3d 1365, 1368 (9th Cir. 1997), *cert. denied*, 523 U.S. 1047, (1998); *One World One Family Now v. City and County of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996), *cert. denied*, 519 U.S. 1009 (1996) (upholding an outright ban on sales of message-bearing T-shirts on the grounds the ban was a reasonable time, place and manner restriction).

B. Second Circuit

In 1996, five years after the Ninth Circuit's *Gaudiya Vaishnava Society* decision, a three-judge panel of the Second Circuit held in a case with very unique facts, *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997), that while "the crafts of the jeweler, the potter and the silversmith [cite omitted] ...may at times have expressive content, paintings, photographs, prints and sculptures... always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection." The Court in *Bery* further held that "Courts must determine what constitutes expression within the ambit of the First Amendment and what does not" and noted that such determinations will "surely prove difficult at times." *Bery*, 97 F.3d at 696.

Eight years after the Second Circuit's *Bery* decision, the District Court for the Southern District of New York, in *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280, 286 (S.D.N.Y. 2004), applied *Bery* to determine what was expressive art and what was non-expressive merchandise. After criticizing *Bery* for automatically categorizing all paintings, photographs, prints and sculptures as "expressive," whether they actually were or not, the District Court found that "the item must manifest some communication, that is, it must express some idea conceived and conveyed from the artist, to merit First Amendment protection," citing *Spence v. State of Washington*, 418 U.S. 405, 409 (1974). The District Court also found that not all art is necessarily expressive, and stated "Admittedly, however broad the standard for identifying

expressiveness may be, not everything labeled or hawked as art falls within it." *Mastrovincenzo,* 313 F.Supp. 3d at 287. After review of the graffiti-style paintings at issue in the case, the District Court held that they were sufficiently expressive art to be afforded full protection under the First Amendment.

Mastrovincenzo was appealed, and the Second Circuit panel noted in its 2006 decision that "Beyond [the *Bery* holding that paintings, photographs, prints and sculptures always communicate an idea or concept and are entitled to full First Amendment protection]... there is a notable dearth of precedent – both within our Circuit and beyond – offering guidance as to when a product should be said to serve predominantly expressive purposes, and, in turn, when its sale or dissemination is protected under the First Amendment." *Mastrovincenzo v. City of New York,* 435 F.3d 78, 92 (2nd Cir. 2006). The *Mastrovincenzo* Circuit Court noted the divergent views of other Courts, including the District Court of Nevada in Petitioner's case, which was quoted as finding that "Only the Second Circuit has gone so far as to award certain visual art – specifically paintings, photographs, prints and sculptures – the full and unquestioned protection of the First Amendment." The Circuit Court also noted that "even *Bery* offered little guidance as to the precise factors that courts should consider when evaluating the expressive capacity of particular goods. *Mastrovincenzo,* 435 F.3d at 92-93; 93, n. 10.

The *Mastrovincenzo* Court, to remedy the shortcomings of *Bery*, created what could be labeled the "dominant expressive purpose" test for classifying merchandise, requiring the following three-step

judicial determination: First, whether an item possesses expressive elements, and if it does; Second, whether the item also has a common non-expressive purpose or utility, and if it does; Third, whether that non-expressive purpose is dominant. If the third step is answered affirmatively, the merchandise is commercial; if negatively, it is noncommercial.

Applying its new "dominant expressive purpose" test, plus several other factors employed by the District Court (including some solely within the control of the vendor), the *Mastrovincenzo* court found that the Plaintiff's graffiti goods serve a predominantly expressive purpose and their sale was therefore protected by the First Amendment. *Mastrovincenzo*, 435 F.3d at 97.

C. Sixth Circuit

The Sixth Circuit, in *ETW Corp v. Jireh Pub., Inc.*, 332 F.3d 915 (6th Cir. 2003) succumbed to the ambiguity created by the lack of judicial definition of the terms "shielded," "protected," "constitutionally protected," "fully protected" and "full constitutional protection," discussed *supra,* and relied on several censorship cases to escalate "protected" forms of expression into an adoption of the holding of *Bery, supra*, that [all] visual art is entitled to "full First Amendment protection" (without recognizing that *Bery* only held that paintings, photographs, prints and sculptures were entitled to "full" protection). *ETW Corp.*, 332 F.3d at 924. The *ETW Corp.* case did not involve sales of merchandise in the public fora, and is only significant to show the confusion that arises from

the lack of definition of the levels of constitutional protection under the First Amendment.

D. Seventh Circuit

The Seventh Circuit, in *Piarowski v. Illinois Community Collage,* 759 F.2d 625, 628 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007 (1985), vaguely adopted a broad interpretation that "artistic" work was protected by the First Amendment. At least one Seventh Circuit District Court decision subsequent to *Piarkowski* applied *Gaudiya Vaishnava Society's* "message-bearing" prerequisites to uphold the sale of qualifying T-shirts. See, *Ayres v. City of Chicago*, 966 F.Supp. 701 (N.D. Ill. 1997), *affirmed*, 125 F.3d 1010 (7th Cir. 1997).

E. District of Columbia Circuit

The decision of *ISKCON of Potomac Inc., v. Kennedy*, 61 F.3d 949, 954 (C.A.D.C. 1995) applied *Gaudiya Vaishnava Society* to conclude that audiotapes containing religious messages were fully protected under the First Amendment.

F. Other Circuits

Only the Ninth Circuit and the Second Circuit have published comprehensive rulings on the scope of the First Amendment as it pertains to the sale of merchandise in a public forum. However, those two Circuits are split on the qualities that merchandise must possess to qualify for sale as "fully protected" speech under the First Amendment, with the Ninth Circuit (*Gaudiya Vaishnava Society,* which dealt with

several different kinds of merchandise) generally requiring that the merchandise, or merchandise coupled with any pure speech associated with its sale, be "message-bearing,"[2] and with the Second Circuit (*Bery*, which dealt only with visual art) requiring only that the item proposed for sale be a specific type of artwork (i.e., painting, photograph, print or sculpture) to achieve "fully protected" status.

The ten other Circuit Courts of Appeal that have not yet issued definitive opinions on the subject may follow the logic of either the Ninth or the Second Circuits, but it is possible that each may create a new path departing from any existing case law. Indeed, it is quite possible that the twelve Circuit Courts of Appeal will eventually generate twelve different opinions on the issue.

III. POTENTIAL STANDARDS TO BE APPLIED TO THE SALE OF MERCHANDISE IN THE PUBIC FORA

A major setback to the development of coherent law on the right to sell merchandise in the public fora has been the judicial application of extremely broad First Amendment censorship law to define the right to sell such merchandise. Petitioner submits that the Second Circuit's *Bery* and *Mastrovincenzo* decisions, the Sixth Circuit's *ETW Corp.* decision, the Seventh Circuit's *Piarowski* decision and the decision of the Ninth

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[2] Petitioner's case in the Ninth Circuit presents a very limited exception to the "message-bearing" requirement, applying only to original paintings by the [original] artist.

Circuit in Petitioner's case are flawed by that misapplication of censorship law. Petitioner further submits that the Court should adopt the rationale of *Gaudiya Vaishnava Society* requiring that a "core" message be present in conjunction with the sale of merchandise for it to have "full protection" under the First Amendment sufficient to authorize its sale in the public fora as "speech."

Petitioner submits that there are four distinct classes of merchandise which may be offered for sale in the public fora, and that the Court should consider establishing different standards under the First Amendment for their sale because no single standard fulfills the stated intent of the First Amendment to apply to "speech."

A. "Ordinary" Merchandise – Not Artistic Expression and Not Communicative

This category consists of items that, standing alone, convey no sense of artistic expression and communicate no concepts or ideas that could be said to fall within the "core" First Amendment topics – political, religious, philosophical or ideological. Further, items in this category have no verbal or written speech falling within those "core" categories that is "inextricably intertwined" with their sale, as tested under *Riley* and *Fox*.

By example, T-shirts printed with the plain words "San Francisco"; "Nike"; "Pepsi"; "Property of Cyndi" or "New England Patriots" would be in this category.

The absence of any "core" message conveyed by this "ordinary merchandise," or by any speech that may be associated with its sale, results in the failure of this type of merchandise to have "full" constitutional protection under the First Amendment. Accordingly, there is no First Amendment right to sell such merchandise in a public forum.

B. "Ordinary" Merchandise – Not Artistic Expression, But is Communicative

This type of merchandise, although presenting no artistic expression, is communicative because (1) it carries or conveys a "core" First Amendment concept or idea within the categories of political, religious, philosophical or ideological to a reasonable person of ordinary intelligence, or (2) because verbal or written speech falling within those "core" categories is "inextricably intertwined" with the sale. Examples of such merchandise include T-shirts printed with the plain words "Vote for Anyone, But Vote"; "Jesus Saves"; "Stop Global Warming." This is essentially the standard of *Gaudiya Vaishnava Society*. Merchandise in this category is entitled to be sold in the public fora subject to content-neutral regulations as to the time, place and manner of sale. *City of Ladue v. Gilleo*, 512 U.S. 43, 55-56 (1994); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

C. Artistic Merchandise – Artistic Expression That is Communicative

Petitioner submits that artistic expression should be given almost complete protection from censorship,

but that it must equate to "speech" to be entitled to be sold in the public forum as "speech." Petitioner therefore suggests that the standards of *Gaudiya Vaishnava Society* should govern the question whether artistic expression expresses a concept or ideal that is "communicative" of some type of "core" message to a reasonable person of ordinary intelligence. As with other sales under that decision, verbal or written "speech" that is "inextricably intertwined" with the sale can constitute a "core" message that would give artistic merchandise "full constitutional protection" and entitle the vendor to sell it in a public forum on a par with "pure speech."

D. Artistic Merchandise – Artistic Expression That is Not Communicative

It is only by misapplication of censorship cases to cases involving the right to sell artistic expression in the public fora that the Second, Sixth, Seventh and Ninth (but only in Petitioner's case) Circuits have found that the sale of messageless artistic expression and "expressive" merchandise in the public fora is "fully protected." Petitioner submits that artistic expression should be given almost absolute protection from censorship, but that it must equate to "speech" to be entitled to be sold in the public fora as "speech." To that end, it should be subject to the foregoing standards of *Gaudiya Vaishnava Society*.

IV. RELATED CONSIDERATIONS

A. Expressive Conduct

The decisions of this Court have stated that conduct must be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments, for as the Court noted in *United States v. OBrien,* 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968), (w)e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Spence v. State of Washington*, 418 U.S. 405, 409 (1974). Although the *Spence* decision dealt with expressive conduct, Petitioner submits that the Court's acknowledgment that mere expression is not always communicative and does not always constitute "speech" should be equally applicable to artistic expression.

B. Particularized Message

In order to conclude that a "message" is not required to be carried or conveyed by "expressive" merchandise for its sale in the public fora to be "fully protected" under the First Amendment, the Second Circuit in *Bery*, 97 F.3d at 694, and *Mastrovincenzo*, 435 F.3d at 92, and the Ninth Circuit in Petitioner's case (A7a-8a), quoted from the censorship case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message

would never reach the unquestionably shielded painting of Jackson Pollock, Music of Arnold Schöenberg or Jabberwocky verse of Lewis Carroll." That statement is quite logical when applied in a censorship case such as *Hurley*, but becomes almost irrational when applied to a case determining whether merchandise offered for sale in the public fora is "speech" and therefore "fully protected" under the First Amendment. Indeed, to apply the *Hurley* holding that a "succinctly articulable message is not a condition of constitutional protection" in the context of merchandise sales in the public fora would certainly lead to a holding that ordinary merchandise, and ordinary merchandise which is imprinted, painted or otherwise adorned with some meaningless artistic expression, automatically constitutes "fully protected" speech. Petitioner has discovered nothing in the history of this Court indicating that the framers of our Constitution intended such an absurd result. *Hurley* should be distinguished for what it is, a censorship case, and held inapplicable to the sale of merchandise in a public forum.

C. Sales

The Court has long held that the sale of protected expression does not reduce the degree of First Amendment protection. In the censorship case of *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988), the Court expounded that "The degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away." However, in merchandise cases, the Circuit Courts have not applied the holding of the *City of Lakewood* to prevent diminishment of

protected expression, but rather to elevate "protected" [from censorship] merchandise being offered for sale in a public forum to the plateau of "fully protected" speech. Indeed, the Second Circuit in *Bery*, 97 F.3d at 694-695, and *Mastrovincenzo*, 435 F.3d at 92, and the Ninth Circuit in Petitioner's case (A8a), each apply *City of Lakewood* to convert merchandise which is "protected" from censorship to merchandise that is "fully protected" speech entitled to be sold in the public fora.

D. Content Neutrality

The purpose of reviewing merchandise to ascertain whether an item, or verbal or written speech associated with its sale, carries or conveys a "core" message differs dramatically from the purpose of regulating merchandise because of disagreement with the message it conveys.

The principal inquiry in determining content neutrality in speech cases is whether the government has adopted a regulation of speech because it disagrees with the message it conveys. *Ward v. Rock Against Racism*, 491 U.S. at 791. The government's purpose is the controlling consideration, and governmental regulation of expressive activity is content neutral so long as it is "justified without reference to the content of the regulated speech," *Id.*, citing *Renton Playtime Theaters,* 475 U.S. 41, 47-48 (1986) and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

The "regulation" proposed by Petitioner is a review of the merchandise and speech accompanying its sale

for the sole purpose of determining whether a "core" message is carried or conveyed. While physical observation of the items is necessary, merely observing an item to determine whether it conveys any "core" First Amendment message is not regulating the dissemination or the sale of the item based on the content of the item or the content of any message it may carry. Under Petitioner's proposal, it is the presence or absence of the message, not the review of the item for messages, that regulates the ability of the vendor to sell the item in the public fora on the same level as "speech." Therefore, the review is "justified without reference to the content of the regulated speech" and should be found to be content neutral.

E. Administration

The absence of precedential law on the sale of merchandise in the public fora under the First Amendment gives the Court virtually unconstrained authority to set appropriate guidelines for the Courts of the land.

Petitioner respectfully suggests that the Court should consider authorizing local content-neutral governmental review of merchandise proposed to be sold in the public fora, for the sole purpose of making an initial determination whether the merchandise meets the criteria of *Gaudiya Vaishnava Society* for sale as "speech" in the public fora. In such an inquiry, the only matters which could be considered would be whether the merchandise (whether "ordinary" or "artistic") carries or conveys a "core" First Amendment message or whether verbal or written speech constituting or conveying such a message accompanies

the sale of the merchandise. Standard dictionary definitions of the words describing the four "core" categories (i.e., political, religious, philosophical and ideological) could be used as a standard to limit the reviewer's discretion to ascertain whether merchandise falls into a "core" category. There would be no prior restraint because the discretion of the reviewers would be sufficiently limited by the dictionary definitions.

CONCLUSION

This case presents an excellent opportunity for the Court to pronounce important new First Amendment law that distinguishes between standards applicable to censorship of expression and standards applicable to the sale of ordinary and artistic merchandise in a public forum. Clarification is necessary to resolve a split among the Circuit Courts, to eliminate the uncertainty and unpredictability of the current law, to assure uniformity in the law and to apprise all governmental entities and the public of their First Amendment rights. To that end, and for the foregoing reasons, the Petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-15582
D.C. No. CV-03-00251-DWH/RAM

[Filed August 29, 2007]

STEVEN C. WHITE, *Plaintiff-Appellee,*	)
v.	)
CITY OF SPARKS *Defendant-Appellant.*	)

Appeal from the United States District Court
for the District of Nevada
David W. Hagen, District Judge, Presiding

Argued and Submitted
February 16, 2007—San Francisco, California

Filed August 29, 2007

Before: Betty B. Fletcher and Richard R. Clifton, Circuit Judges, and Edward F. Shea,* District Judge.

Opinion by Judge B. Fletcher

COUNSEL

Thomas F. Riley, Senior Assistant City Attorney, Sparks, Nevada, for the defendant-appellant.

Terri Keyser-Cooper (argued), Law Office of Terri Keyser-Cooper, Reno, Nevada, and Diane K. Vaillancourt (briefed), Law Office of Diane K. Vaillancourt, Santa Cruz, California, for the plaintiff-appellee.

OPINION

B. FLETCHER, Circuit Judge:

This appeal presents the question of what protection the First Amendment extends to the sale by an artist of his paintings. We hold that an artist's sale of his original artwork constitutes speech protected under the First Amendment.

I.

Appellee Steven C. White ("White") is an itinerant artist who earns a living by setting up an easel on a city's sidewalks and in parks and selling his paintings

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* The Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

to passersby who take an interest in his work. A painter of nature scenes, White believes his paintings convey, among other messages, the message that human beings are driving their spiritual brothers and sisters, the animals, into extinction.

The city of Sparks, Nevada ("Sparks") prohibits the sale of merchandise in its parks and limits sales in the redevelopment area known as Victorian Square to those vendors having permits under Sparks Municipal Code §§ 5.59 et seq. For those without vendor's permits, Sparks makes a limited exception allowing the display of merchandise in its parks and Victorian Square as well as the sale (in both places) of items that have received the pre-approval of city employees through a First Amendment exception to the vendor-permitting ordinances ("First Amendment exception" or "pre-approval policy"). According to the city, to gain such preapproval an item must be submitted to the city and determined by city officials to convey an express or obvious religious, political, philosophical, or ideological message under *Gaudiya Vaishnava Society v. City and County of San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1990) (extending First Amendment protection to "the sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message").[1]

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[1] The city has presented no evidence confirming the existence of this First Amendment exception except for the representations of counsel before this court and before the district court. However, because the city has conceded the exception, we, like the district court, will presume the existence of the policy.

White brought a facial challenge to Sparks's vendor-permitting scheme. He then moved for summary judgment on the question of whether he may sell his paintings on the same basis as he may display them, i.e., free of restraint. The city opposed on the ground that White's paintings are unprotected by the First Amendment because they do not patently express a religious, ideological, political, or philosophical message.

Agreeing for the most part with White and reading *Gaudiya* broadly, the district court granted White's motions[2] to the extent he requested a ruling that his paintings expressed a message warranting First Amendment protection. To the extent White requested a global ruling that all visual art is per se constitutionally protected, the district court declined to extend its ruling beyond protection of White's paintings. Finally, the district court concluded that Sparks's preapproval policy constituted an unconstitutional prior restraint because it failed to include objective criteria for approving or rejecting a piece of artwork. Sparks appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.[3]

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[2] White filed separate motions for the city's parks and for Victorian Square. As they present the same First Amendment question, we analyze the motions together.

[3] The district court's partial grant of summary judgment and denial of the rest constituted a final judgment in this case, as all other claims have been resolved. Sparks appeals the partial grant. White does not appeal the partial denial.

II.

We review de novo a district court's grant of partial summary judgment, *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1116 (9th Cir. 2004), and may affirm on any ground supported by the record, *Venetian Casino Resort v. Local Joint Executive Bd. of Las Vegas*, 257 F.3d 937, 941 (9th Cir. 2001). After "viewing the evidence in the light most favorable to the nonmoving party," we determine "whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Am. Civil Liberties Union of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003).

III.

The parties argue over law, not fact. To that extent, summary judgment is appropriate because no genuine issue of material fact existed. We therefore turn to the question of whether the district court "correctly applied the relevant substantive law." *Id.* at 1097.

A.

Sparks argues that the First Amendment protects the sale of paintings in public fora only if the paintings convey an explicit—or an implicit but obvious—message that fits into one of the categories we established in *Gaudiya*. We disagree.

[1] In *Gaudiya*, we held that First Amendment protection extended to the "sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological

message." 952 F.2d at 1066. The merchandise at issue in *Gaudiya*—clothing, jewelry, and stuffed animals sold as fundraisers by charities and advocacy groups—lacked inherent expressive value and gained expressive value only from its sale being "inextricably intertwined" with pure speech. *Id.* at 1064. To the extent that visual art is inherently expressive, the *Gaudiya* test is inapplicable.

[2] While not having spoken directly on the protections afforded visual art, the Supreme Court has been clear that the arts and entertainment constitute protected forms of expression under the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981) (dance); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (theatre); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-34 (1975) (topless dancing); *Miller v. California*, 413 U.S. 15, 34-35 (1973) (serious artistic work, unless obscene in the legal sense); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (movies).

[3] Against this backdrop, it is clear that White's self-expression through painting constitutes expression protected by the First Amendment. In painting, an artist conveys his sense of form, topic, and perspective. A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with "the unquestionably shielded painting of Jackson Pollock." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Any artist's original painting

holds potential to "affect public attitudes," *Joseph Burstyn, Inc.*, 343 U.S. at 501, by spurring thoughtful reflection in and discussion among its viewers. So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective.[4]

In holding that the First Amendment protects an artist's original paintings, we join two of our sister circuits. *See ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (holding that "[t]he protection of the First Amendment . . . includes . . . music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures"); *Bery v. City of New York*, 97 F.3d 689, 696 (2d Cir. 1996) ("[P]aintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection."); *see also Piarowski v. Ill. Cmty Coll. Dist. 515*, 759 F.2d 625, 628-32 (7th Cir. 1985) (holding that stained glass windows, as "art for art's sake," were protected under the First Amendment).

The city's argument that the message conveyed must be either explicit or implicit but obvious in order to merit protection must fail. As the Court has explained, "a narrow, succinctly articulable message is

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[4] We expressly reserve the question whether all paintings merit First Amendment protection. We are not asked to decide the protection accorded to paintings that are copies of another artist's work or paintings done in an art factory setting where the works are mass-produced by the artist or others.

not a condition of constitutional protection, which if confined to expressions conveying a particularized message would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569 (internal quotation marks and citation omitted).

Nor are we convinced by the city's argument that White's sale of his paintings removes them from the ambit of protected expression. "[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away." *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n.5 (1988); *see also Riley v. Nat'l Fed'n of the Blind of N. C.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak."); *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 633 (1980).

Finally, even purely commercial speech is entitled to significant First Amendment protection. *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 480-81 (1997); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421-23 (1993); *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). Purely commercial speech is "speech which does 'no more than propose a commercial transaction.'" *Virginia Bd. of Pharmacy*, 425 U.S. at 762 (*quoting Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)). White's paintings, which communicate his vision of the sanctity of nature, do more than propose

a commercial transaction and therefore are not commercial speech.

[4] In sum, we agree with the district court that the city applied the wrong First Amendment standard in its First Amendment exception to its vendor-permitting policy and hold that an artist's sale of his original paintings is entitled to First Amendment protection.[5]

B.

[5] Sparks contends that the district court, in ruling that White's paintings were protected under the First Amendment, usurped the city's authority to make that determination in the first instance. This argument ignores our tripartite structure of both state and federal government. While the executive branch must both interpret and apply the law, that authority does not strip the judiciary of its authority to review laws at issue in cases properly before it to determine, for example, whether they impermissibly tread on First Amendment rights. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it."); *see also Gaudiya*, 952 F.2d at 1065 (ruling, in a facial challenge to an

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[5] Because we set out a materially different First Amendment standard than that the city had articulated, we do not reach the city's arguments that use of a dictionary and common sense to define the *Gaudiya* categories sufficiently constrained official discretion to avoid creating a risk of censorship.

ordinance, that the merchandise at issue was protected).

C.

[6] Finally, Sparks argues that White lacks standing to challenge the city's permitting scheme because he never submitted his artwork to the city for review. Because Sparks raised this argument for the first time in its reply brief to this court, it has waived the argument. *See Holland Am. Line Inc. v. Wrätsilä N. Am., Inc.*, 485 F.3d 450, 457 (9th Cir. 2007) (holding that appellant waived an argument by failing to raise it before the district court).

IV.

For these reasons, the district court's grants of partial summary judgment are **AFFIRMED.**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-15582
D.C. No. CV-03-00251-DWH/RAM

[Filed August 29, 2007]

STEVEN C. WHITE,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
CITY OF SPARKS	)
	)
Defendant-Appellant.	)
	)

JUDGMENT

Appeal from the United States District Court for the District of Nevada (Reno).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Reno) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 08/29/07

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-N-03-0251-DWH (RAM)

[Filed August 5, 2004]

STEVEN C. WHITE, Plaintiff,	)
v.	)
CITY OF SPARKS, Defendant.	)

ORDER

Before the court is plaintiff's motion for partial summary judgment (#50). Plaintiff has filed separate exhibits in further support of this motion (#51). Defendant has opposed (#53), and plaintiff has replied (#54). In response to plaintiff's reply, defendant filed a motion to strike all new argument first raised in plaintiff's reply, and, alternatively, a supplemental opposition to plaintiff's motion for partial summary judgment (#57). Plaintiff countered by filing in a single document: (1) an opposition to defendant's motion to strike (#59); (2) a motion to strike defendant's supplemental opposition (#60); and (3) a supplemental

reply in support of his motion for partial summary judgment (#61). Defendant responded with: (1) a motion to strike plaintiff's supplemental reply (#63); (2) an opposition to plaintiff's motion to strike defendant's supplemental opposition (#64); and (3) a reply to plaintiff's opposition to defendant's motion to strike (#65). Plaintiff then filed an opposition to defendant's motion to strike plaintiff's supplemental reply (#67), to which defendant replied (#68).

Also before the court is plaintiff's motion for partial summary judgment as to Victorian Square (#55) and an errata thereto containing a missing exhibit (#56). Defendant has opposed (#58), and plaintiff has replied (#62).

I. *Factual Background*

Plaintiff Steven C. White ("White") brings this case against the City of Sparks pursuant to 42 U.S.C. §§ 1983 and 1988, claiming that his rights under the First and Fourteenth Amendments to the United States Constitution have been violated because Sparks Municipal Code ("SMC") §§ 5.59, *et seq.*, prohibits him from selling his art on Sparks's streets and parks without first obtaining a "Roadway and Sidewalk Vendors" license. (*See generally* Compl. (#2).) White earns his living as an artist by traveling throughout the United States, setting up an easel on streets and in parks, and interacting with passersby who take an interest in his work. (*Id.* at ¶ 6.) His subject matter is nature and his paintings often include trees, mountains, animals, and birds. (*Id.*) Many of White's paintings have a "'Native American' theme, incorporating his philosophy about the environment,

the spirituality of the universe, and the need to protect animals." (*Id.*) He "believes his paintings convey the message that human beings are driving their spiritual brothers and sisters, the animals, into eternity/extinction." (*Id.* at ¶ 8.) White has refrained from displaying and selling his work in Sparks's city parks and Victorian Square areas because he is "intimidated by the licensing requirements, unclear what criteria would be used to judge his art, and fearful of arrest." (*Id.* at ¶ 11.)

White has brought a cause of action under the First Amendment, alleging that SMC §§ 5.59 *et seq.*, regarding the licensing of "Roadway and Sidewalk Vendors," is facially unconstitutional because, *inter alia*, it is vague, overbroad, and operates as a prior restraint on speech. (*Id.* at 5.) He also has pled two causes of action under the Fourteenth Amendment for due process and equal protection violations. (*Id.* at 5-6.) The gist of plaintiff's constitutional argument is that these provisions of the city ordinance are both content-based restrictions and prior restraints on speech that are not narrowly tailored to serve a significant government interest and do not leave open ample alternative channels of communication. Specifically, plaintiff believes that there is no reasonable distinction between merely displaying original art–which is not subject to the contested provisions–and selling it. (*See generally* Pl.'s motions for partial summary judgment (#s 50, 55).) White requests relief in the form of: (1) a declaration that SMC §§ 5.59, *et seq.*, as pertaining to Roadway and Sidewalk Vendors, is unconstitutional either on its face or as applied to plaintiff because it violates plaintiff's First and Fourteenth Amendment rights; (2)

compensatory damages in an amount to be determined at trial; (3) temporary, preliminary, and permanent injunctive relief enjoining defendants from enforcing the Roadway and Sidewalk Vendors ordinance; (4) attorneys fees and costs pursuant to 42 U.S.C. § 1988, or any other applicable statute; and (5) any other relief deemed just and proper by the court. (Comp. (#2) at 6-7.) White also filed a motion for preliminary injunction (#5), which the court denied (#33). The denial was affirmed by the Ninth Circuit on appeal (#46, #47).

Defendant, City of Sparks ("Sparks") has counterclaimed, alleging that relevant SMC provisions[1] neither impose prior restraints on the sale of any person's artwork nor restrict the mere display of artwork, and instead are facially constitutional time, place, and manner restrictions. (Counterclaim (#17) at 9.) Sparks also contends that because plaintiff never applied for a business license, an outdoor sales business license or a Victorian Square Vendor's Permit as allowed under the SMC, he "has waived, or is estopped to argue, [*sic*] that the SMC provisions are unconstitutional 'as applied' to him." (*Id.*) The city requests that judgment be entered (1) declaring the provisions of the SMC to be facially constitutional under the First Amendment and the due process and equal protection clauses of the Fourteenth Amendment, and (2) finding that plaintiff does not

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[1] In its counterclaim, Sparks identifies various other SMC sections in addition to the ones challenged, including SMC §§ 20.53, *et seq.*, pertaining to the sale of artwork on Sparks's streets and in its parks.

have standing to bring an "as applied" challenge because he failed to apply for a business license, and outdoor sales license, or a Victorian Square Vendor's Permit. (*Id.* at 10.)

II. *Analysis*

A. Motions to Strike, Supplemental Responses, and Requests for Sanctions

While the court recognizes that litigation is an inherently contentious endeavor, the parties to this particular action have gone to great and excessive lengths in order to have what they describe as "the last word." In the wake of a motion by plaintiff for partial summary judgment (#50), both sides have filed motions to strike along with supplemental responses and have requested the issuance of sanctions, vehemently protesting one another's impertinence and objecting to unfair argumentation and improper pleading. What neither party seems aware of, however, is that this is clearly a situation of the pot calling the kettle black. For example, defendant, who may be credited with beginning this battle of the paperwork, filed a motion to strike a "new argument" in plaintiff's reply for violating LR 7-2, and accompanied it with a supplemental opposition for which he did not seek leave of the court to file. Plaintiff responded by filing both a motion to strike defendant's supplemental opposition, also claiming a violation of LR 7-2, and a supplemental reply. Defendant then filed a second motion to strike, requesting that plaintiff's supplemental reply be stricken because plaintiff "contemptuously ignored all Court Rules, including *failing to seek leave of court* . . . to file his

'Supplemental Reply'." (#63 at 2 (emphasis added).) Despite the fact that the parties' arguments have degenerated into what can only be described as quibbling, the court has reviewed and will address these issues to the extent necessary to resolve the matter before it–plaintiff's motion for partial summary judgment (#50).

Defendant's first motion to strike (#57) claims that plaintiff has "injected an entirely new argument and request for relief" into his reply, and that this argument, which raises the question of whether plaintiff's art is constitutionally protected simply because it is art, should be stricken as violating the language and intent of LR 7-2. (Mot. to Strike (#57) at 4.) Defendant also points to Fed. R. Civ. P. 12(f), which allows a court to strike "from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter," as authority for striking this "new argument," as well as Ninth Circuit case law stating that "[n]ew material does not belong in a reply brief" because it "provides the appellee no opportunity to meet the contention." (*Id.* at 5) (quoting *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981).) Plaintiff, in opposition, argues that defendant's motion to strike is disingenuous in that it is an improper and cynical attempt both to interject a supplemental brief into the motion cycle and to manipulate the court rules in order to delay appropriate resolution of this case. (Opp'n to Def.'s Mot. to Strike (#59) at 1-2.) According to plaintiff, nothing in his reply warrants being either stricken or opposed because it is "a straight-on response to defendant's opposition" that also "adheres closely to

both the letter and intent of his original motion." (*Id.* at 2-3.)

In deciding whether to strike part of plaintiff's reply, the court must first determine whether it in fact contains any new arguments. Specifically, the question is whether plaintiff in his motion for partial summary judgment (#50) raised the argument that his art is constitutionally protected expression simply because it is art. The court finds that he did. Plaintiff, in his motion for partial summary judgment (#50), argues among other things that unlike merchandise, artistic expression need not have a political, religious, philosophical, or ideological message in order to be protected by the First Amendment. (Pl.'s Mot. for Partial Summ. J. (#50) at 10.) He claims that paintings "historically [have been] viewed as containing First Amendment protected expression," and that sale of such protected materials also is protected. (*Id.* at 11.) In fact, plaintiff repeatedly contends that visual arts in general and paintings specifically always are entitled to First Amendment protection. (*See id.* at 11, 12 ("[v]isual art . . . entitled to full First Amendment protection"), 15 ("paintings, photographs, prints, and sculptures . . . always communicate some idea or concept . . . and as such are entitled to full First Amendment protection"), 16 ("First Amendment found to protect . . . art" and "White's paintings and sculpture fall squarely within the area of protected expression historically recognized as warranting First Amendment protection.").) Plaintiff's claim in his reply that his art is constitutionally protected simply because it is art (Pl.'s Reply (#54) at 14) is merely another formulation of these arguments, and as such was clearly and unequivocally set forth in his motion.

To find otherwise would be absurd. Moreover, the court wonders how defendant can even claim this argument is new when it attempted to refute the argument in its original opposition, stating that "[i]t is clear that the sale of *all* artwork does not fall within the constitutional protections afforded by the First Amendment." (Def.'s Opp'n (#53) at 9; *see also id.* at 14 (acknowledging that plaintiff cited to *Bery v. City of New York*, 97 F.3d 689 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1251 (1997), as authority that "*all* of an artist's paintings are protected under the First Amendment" and contending that "[n]othing could be further from the truth).")

Accordingly, because this court finds no new arguments in plaintiff's reply (#54), defendant's motion to strike (#57) is denied. Neither defendant's supplemental opposition, nor plaintiff's supplemental reply will be considered. Plaintiff's motion to strike defendant's supplemental opposition (#60) is denied as moot, as is defendant's motion to strike plaintiff's supplemental reply (#63). Although the court is dismayed by the pettiness displayed by both parties in filing these frivolous motions, neither parties' request for sanctions will be granted.

B. Motions for Summary Judgment

Plaintiff has filed two separate motions for summary judgment. The first pertains to Sparks's city parks (#50), and the second to Victorian Square in Sparks (#55).

1. Standard on Motion for Summary Judgment

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party, and for this purpose, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *Lynn v. Sheet Metal Workers' Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir. 1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla of evidence will not do, for a jury is permitted to draw only those inferences of which the evidence is reasonably

susceptible; it may not resort to speculation." *British Airways Board v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event the trial court concludes that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free . . . to grant summary judgment."). Moreover, "[i]f the factual context makes the non-moving party's claim of a disputed fact implausible, then that party must come forward with more persuasive evidence than otherwise would be necessary to show there is a genuine issue for trial." *Blue Ridge Insurance Co. v. Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal. Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that are unsupported by factual data cannot defeat a motion for summary judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

Finally, if the nonmoving party fails to present an adequate opposition to a summary judgment motion, the court need not search the entire record for evidence that demonstrates the existence of a genuine issue of fact. *See Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1029-31 (9th Cir. 2001) (holding that "the district court may determine whether there is a genuine issue of fact, on summary judgment, based on the papers submitted on the motion and such other papers as may be on file and specifically referred to and facts therein set forth in the motion papers"). The district court need not "scour the record in search of a genuine issue of triable fact," but rather must "rely on the nonmoving party to identify with reasonable

particularity the evidence that precludes summary judgment." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). "[The nonmoving party's] burden to respond is really an opportunity to assist the court in understanding the facts. But if the nonmoving party fails to discharge that burden-for example by remaining silent–its opportunity is waived and its case wagered." *Guarino v. Brookfield Township Trustees,* 980 F.2d 399, 405 (6th Cir. 1992).

2. Motion for Partial Summary Judgment as to Sparks's City Parks (#50)

Plaintiff has moved "for partial summary judgment on the issue of whether he may sell his art in Sparks's city parks on the same terms that he is permitted to display his art" in those parks.[2] (Pl.'s Mot. for Partial Summ. J. (#50) at 2.) Plaintiff claims that Sparks's policy mandating that art first be shown to Sparks's employees to ascertain whether they believe it

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[2] The fact that plaintiff may display his art in Sparks's typical city parks without restriction is actually of no consequence to this litigation. The reason that plaintiff may do so is not because he is constitutionally permitted to do so, but because Sparks has no ordinance prohibiting it. "Our cases make clear . . . that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989). Here the city apparently chose only to regulate sales and not display.

contains a protected constitutional message before it can be sold in city parks is pure content-based discrimination. (*Id.* at 4-7.) Specifically, plaintiff contends that his artwork is fully protected under the First Amendment (*id.* at 10-13), and that because city parks are public fora, strict scrutiny applies to this type of content-based restriction on expression (*id.* at 13-14). Plaintiff requests that the court declare as unconstitutional and permanently enjoin "Sparks' [*sic*] policy prohibiting him from selling his art in Sparks' [*sic*] parks without Sparks' [*sic*] examination of his art to discern whether it contains an appropriate 'religious, political, ideological, or philosophical' message." (*Id.* at 25.) In his reply (#54), plaintiff appears to have narrowed the issue on which he is seeking partial summary judgment to whether art is per se constitutionally protected. (Reply (#54) at 2.) According to plaintiff, such a determination would end the inquiry because Sparks has conceded that under its policy a "vendor is entitled to sell his protected 'speech' in the parks subject to only the same park rules and regulations as all other users." (*Id.* at 2-3 (quoting Opp'n (#53) at 11).)

SMC § 20.53.030B[3] places limitations on "the sale of goods not in connection with an established business," the first of which requires that such sales only be conducted in "a C1, C2, IC or TC district within an established commercial development." This provision has been interpreted by the city to prohibit the sale of goods in its typical parks which are designated as public facilities, or PF, districts. (Opp'n (#53) at Ex. J.) The violation of this provision would result in a misdemeanor under SMC 1.12.01. (*Id.*) While there do not appear to be any explicit exceptions to this total ban on the sale of goods in its parks, Sparks has represented through its pleadings, responsive motions, and answers to interrogatories that "goods" only refers to goods or merchandise not protected as speech under the First Amendment.[4] (*Id.*

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[3] The court notes that the motion for partial summary judgment requests only a determination regarding the extent to which visual artistic expression is protected by the First Amendment, and the constitutionality of Sparks's policy excepting First Amendment protected speech from its ban on sales of goods in its typical city parks. The court was not asked to consider the underlying ordinance, SMC § 20.53.030B, to determine its constitutionality for First Amendment purposes in the absence of the interlineated policy. As such, the court expresses no opinion as to whether Sparks may totally ban all sales of goods, including items qualifying as protected speech, in its typical city parks.

[4] The court has no evidence of the existence of this policy other than these representations advanced during litigation by the city attorney. In fact, the affidavit of the Operations Superintendent for the Sparks Department of Parks and Recreation, in which he stated that he informed plaintiff "he couldn't sell his paintings in the parks even if he obtained a business license" (Bessette Aff. ¶ 3, Opp'n (#53) at Ex. E), and that "if any sales of artwork took place,

at 5.) According to the city, it will allow an individual to sell his or anyone else's paintings in its typical parks without restriction (i.e., no license or permit required), "if the painting offered for sale conveys a religious, political, philosophical or ideological 'message'." (*Id.*) A person wishing to sell goods or merchandise as "protected speech" must seek a determination to that effect from the city's staff, who "has been instructed to obtain a legal opinion before granting or denying any request." (*Id.*) Sparks states that the determination of "whether goods or merchandise presents [*sic*] a religious, political, philosophical or ideological message is based on common sense and the plain meanings of the four categories," and further claims that "[t]here are no limiting criteria or standards, which could result in incorrect determinations." (*Id.* at 7.)

a. Protected "Speech"

As an initial matter, it is unquestioned that the First Amendment protection is not lost simply because the protected expression is sold for profit. *See City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 756 n. 5 (1988) (expressive items are no less protected than they would otherwise be under the First Amendment merely because they are sold for profit); *see also Riley v. Nat'l Fed'n of Blind of North Carolina*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received;

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it would be illegal" (*id.* at ¶ 4), belies the existence of this policy. However, because defendant has conceded it, the court will presume the policy exists.

a speaker is no less a speaker because he or she is paid to speak."). It is also unquestioned that the First Amendment shields far more than just written and spoken forms of expression. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569 (1995). However, contrary to plaintiff's assertions, all visual art is not historically and unquestionably entitled to full First Amendment protection. While the Supreme Court has found protection for a broad array of artistic expression, including music, theater, and film, *see, e.g., Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989) (music without regard to words); *Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 557-58 (1975) (theater); *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 501-02 (1952) (film); *Miller v. California,* 413 U.S. 15, 34-35 (1973) ("expression of serious literary, artistic, political, or scientific ideas," unless obscene in legal sense); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932-34 (1975) (topless dancing), as well as for many instances of expressive conduct, *see e.g. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) (parades); *Gregory v. Chicago,* 394 U.S. 111, 112 (1969) (peaceful marches to express grievances to governmental authorities); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 505 (1969) (wearing of black arm bands to evidence disapproval of U.S. involvement in Vietnam); *Brown v. Louisiana,* 383 U.S. 131, 141-42 (1966) (sit-ins to protest racial discrimination); and *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 632 (1943) (refusal to salute flag), it has not provided blanket protection for all visual art. The Supreme Court, however, has explained that "a narrow, succinctly articulable message is not a

condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley,* 515 U.S. at 569 (citation omitted).

Only the Second Circuit has gone so far as to award certain visual art-specifically paintings, photographs, prints and sculptures-the full and unquestioned protection of the First Amendment. *Bery v. City of New York,* 97 F.3d 689, 695 (2nd Cir. 1996), *cert. denied,* 520 U.S. 1251 (1997); *see also Piarowski v. Illinois Community College Dist. 515,* 759 F.2d 625, 628 (7th Cir.), *cert. denied,* 474 U.S. 1007 (1985) (stained glass windows constituting "art for art's sake" nevertheless protected under First Amendment's guarantees which embrace purely artistic as well as political expression). In *Bery,* the Second Circuit held that "[v]isual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection." *Bery,* 97 F.3d at 695. In expressing this unprecedented holding the court distinguished between art and merchandise, stating that while "the crafts of the jeweler, the potter and the silversmith who seek to sell their work . . . may at times have expressive content, paintings, photographs, prints and sculptures . . . always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection." *Id.* at 696.

While plaintiff would have this court adopt the *Bery* holding and find that all paintings, photographs,

prints and sculptures are inherently expressive, thereby eliminating the need for any individualized inquiry into the expressiveness of a particular piece of art or a particular type of artwork, the court declines this invitation. Applying such a blanket presumption of protected status would not only be unnecessary to resolve the motion before the court, but would also be out of step with Ninth Circuit precedent and the First Amendment's fundamental purpose-to protect *expression*. Even a lower court within the Second Circuit faced with interpreting and applying the *Bery* holding recognized the decision's inherent problems. The Southern District of New York, in *Mastrovincenzo v. City of New York*, 313 F. Supp. 2d 280 (S.D.N.Y. 2004), attempting "to delineate a border between protected, expressive art and unprotected, non-expressive merchandise," *id.* at 286, noted that the difficulty with *Bery* is that it is

> arguably at once too broad and too narrow in [its] scope of protection. Conceivably, not every item of painting, photograph, print or sculpture that may be offered for sale on City sidewalks by any vendor is necessarily so expressive as to categorically merit First Amendment protection, but at the same time some objects outside those four categories may also be sufficiently expressive.

Id. at 294 n. 11. This court agrees with the Southern District of New York that "not all forms of visual artwork are always necessarily so communicative or expressive that no further inquiry is needed to determine whether they merit First Amendment protection," *id.* at 286, and therefore declines to find

that all visual artwork is entitled to full First Amendment protection.

While the Ninth Circuit has not yet specifically faced the question of whether and to what extent art is protected by the First Amendment, it has stated that "[t]he sale of merchandise which carries or constitutes a political, religious, philosophical or ideological message falls under the protection of the First Amendment." *Am. Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1107 (9th Cir. 2003), *cert. denied*, 540 U.S. 1110 (2004) (citing *Gaudiya Vaishnava Society v. City and County of San Francisco*, 952 F.2d 1059, 1063 (9th Cir. 1990)). Defendant argues that this standard must be applied to plaintiff's work in order to determine whether it is protected speech under the First Amendment, and that only merchandise containing a message falling within one of those four categories is entitled to First Amendment protection. (Opp'n (#53) at 8-9.). Specifically, defendant contends that "[t]he sale of a painting, computer-generated image, or other depiction of a bowl of fruit, a young girl, a herd of deer, a mountain lake, a medieval castle or a million other things which do not carry or constitute a 'political, religious, philosophical or ideological message' are not protected." (*Id.* at 9.) The city further insists that "[s]imply because artwork may be 'beautiful' or merely 'pleasant to look at' does not afford constitutional protection to its sale." (*Id.*) Moreover, a footnote in defendant's opposition, noting that many of plaintiff's paintings do not include "potentially protected symbols such as white buffalo and Indian faces" (*id.* at 12 n. 2), indicates to this court that the city has interpreted the Ninth Circuit's language very narrowly. Plaintiff, on

the other hand, relying on the distinction made by *Bery,* claims that this standard is inapplicable because he wants to sell art and not merchandise. (Reply (#54) at 11.)

Although this court agrees with the Second Circuit in finding a distinction between art and merchandise, it recognizes, like the Southern District of New York, that this distinction is at best a blurry line, the precise delineation of which may prove impossible. "Because . . . almost every object can conceivably be interpreted as having some expressiveness, there may be instances when the line between protected expression and unprotected merchandise will seem arbitrary. Such is the stuff of First Amendment law." *Mastrovincenzo,* 313 F. Supp. 2d at 292. In the absence of binding precedent to the contrary, rather than attempt to distinguish the Ninth Circuit standard for the sale of merchandise from plaintiff's desire to sell his artwork, the court prefers to find plaintiff's art protected by the First Amendment under the Ninth Circuit's standard. First, this court must note that defendant's interpretation of that standard is far too restrictive. The Supreme Court has explained that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) (citation omitted). Accordingly, the Ninth Circuit's requirement–that merchandise carry or constitute a political, religious, philosophical or ideological message

in order to merit First Amendment protection–must be read broadly to encompass both explicit, understandable messages and implicit, abstract expression. If Pollock's work conveys a message likely to be understood by the viewer, then "it is difficult to conceive of many works of art that would fail" this test. *See Mastrovincenzo,* 313 F. Supp. 2d at 287.

Plaintiff here has submitted several examples of his work. (Pl.'s Exs. in Further Support of Mot. for Partial Summ. J. (#51).) He also has provided this court with a declaration stating that his art conveys his message of "love for nature and wildlife" (Pl.'s Dec. at ¶ 5, Pl.'s Mot. for Summ. J. (#50), Ex. 5), that many of his paintings have "a Native American Spiritual theme" and "express the importance of caring for the environment and protecting . . . the other living creatures that share mother earth" (*id.* at ¶ 8), and that his paintings are intended to "teach people and convey a message about human beings driving . . . the animals into eternity/extinction." (*Id.* at ¶ 9.) Defendant, relying on these statements and arguing that this is an admission by plaintiff that not all of his work is protected, intimates that plaintiff's work must contain specific symbols such as white buffalo or spirit faces in the clouds in order to convey his message and constitute protected speech. (Opp'n (#53) at 12 n. 2). This is a misapplication of First Amendment law. In light of *Hurely,* it must be sufficient that plaintiff's work express some political, religious, philosophical, or ideological idea, and cannot be required to convey a particular message immediately obvious and understandable to any viewer. The court finds the submitted examples of plaintiff's work, with or without his accompanying declaration, to carry or constitute a

political, religious, philosophical, or ideological message, so as to merit the protection of the First Amendment. Moreover, based on the representations made by plaintiff in his affidavit, it is likely that much if not all of his art work could be found to meet the Ninth Circuit's protected merchandise standard. In fact, even if a particularized message were required, which after *Hurley* it is not, plaintiff's work, at least to the extent submitted or represented to this court, would clearly still fall under the First Amendment's protection. "[G]enuine art is specifically produced by an artist attempting to convey a particularized message" and as such, "it is more likely than not that art will contain an expressive message." *Mastrovincenzo,* 313 F. Supp. 2d at 287.

b. Constitutionality of Sparks's Policy

Because the court has declined plaintiff's invitation to apply a presumption of First Amendment protection to all visual arts, the questions remain whether and to what extent defendant has the right to insist on reviewing and pre-approving plaintiff's work prior to allowing its sale in Sparks's city parks. This presents an interesting issue because to the extent that the city is taken at its word, it is not attempting to regulate protected speech at all. Instead, it is simply reserving for itself the right to make the determination of whether speech is or is not protected. If a particular work or good is determined to be protected speech under the First Amendment, then "the inquiry stops there and the vendor is entitled to sell his protected 'speech' in the parks." (Opp'n (#53) at 11.) However, because this policy could result in the regulation of protected speech–for example, the city might make an

incorrect determination–it must be analyzed as a restriction on speech.[5] Because the pre-approval of a city official is required prior to the sale of any protected work, this policy operates as a permit or license requirement.

Sparks makes the argument that its policy is a valid content-neutral regulation, and that it imposes no prior restraint on speech "because the content of the message is irrelevant in determining the right to sell protected merchandise." (Opp'n (#53) at 11.) However, "[a] prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials." *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998) (citing *Near v. State of Minnesota ex rel Olson*, 283 U.S. 697, 713 (1931)). Such is the case when a permit or license requirement places unbridled discretion in the hands of a government official. *See City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757 (1988) (citations omitted). Moreover, "[i]t is well-settled . . . that even content-neutral time, place, and manner regulations may not confer unbridled discretion on the licensing authority, so as to stifle free expression." *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1138 (9th Cir. 2004) (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002); *Forsyth County, Ga. v. Nationalist*

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[5] Given that defendant has demonstrated its intention to apply the Ninth Circuit's standard for protected merchandise in a narrow manner that does not comport with constitutional principles, this is not merely a theoretical possibility, but rather a matter of genuine concern for the court.

Movement, 505 U.S. 123, 130-133 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969); *Cox v. Louisiana*, 379 U.S. 536, 554-58 (1965); *Am. Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1106-08 (9th Cir. 2003)). In fact, such restrictions must "contain adequate standards to guide the official's discretion and render it subject to effective judicial review." *Thomas*, 534 U.S. at 323. A regulation without objective standards places the permitting and licensing decisions at the whim of city officials, enabling them to favor some speakers while suppressing others. *Southern Oregon Barter Fair*, 372 F.3d at 1138. While prior restraints are not per se unconstitutional, "the Supreme Court has repeatedly stated that '[a]ny system of prior restraint' bears a 'heavy presumption against its constitutional validity.'" *Baby Tam*, 154 F.3d. at 1100 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990)). The question is whether the standards are "so imprecise that discriminatory enforcement is a real possibility." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991). Because defendant's policy allows people to sell items in its typical city parks only if the items for sale are protected by the First Amendment, the determination of which is made by Sparks's city officials, this policy is properly analyzed as a prior restraint.

Here, the city's policy is to "allow an individual (e.g. the Plaintiff) to sell (his or anyone else's) paintings in the CITY's 'typical' parks if the painting offered for sale conveys a religious, political, philosophical or ideological 'message'." (Opp'n (#53) at 5.) While the city claims it "does not make any inquiry into the content of the 'message,'" a person seeking to sell any goods or

merchandise as protected speech must obtain a determination from the city's staff that his goods or merchandise are in fact protected speech. (*Id.* at 5-6.) The city's officials apparently have been instructed to obtain a legal opinion before granting or denying any request seeking such a determination. (*Id.* at 6.) The standard used by the city to determine whether particular goods or merchandise present "a religious, political, philosophical or ideological message is based on common sense and the plain meanings of the four categories." (*Id.* at 7.) Defendant explains that "[s]ome messages will be patently displayed on goods and merchandise, while other messages will be derived from meanings or words or symbols (e.g., the symbol of a whale for Greenpeace's 'save the whales' environmental movement)." (*Id.*) According to defendant, "[t]here are no limiting criteria or standards, which could result in incorrect determinations." As such, defendant in effect has conceded that its officials have nearly unbridled discretion in determining whether a particular work is protected by the First Amendment. Because the city has not delineated any objective standards, its officials could easily interpose their personal judgments in a manner inimical to the protection of First Amendment rights. Although defendant has claimed that common sense and the plain meaning of the categories will guide the decision makers, this can hardly be considered narrow, objective, and definite criteria. Not only are defendant's standards imprecise, they are admittedly non-existent, making the possibility of discriminatory enforcement very real indeed. *See Gentile,* 501 U.S. at 1051. Moreover, as discussed above, defendant has demonstrated its intention to apply the Ninth Circuit's protected merchandise

standard in a narrow, particularized manner that will certainly restrict First Amendment protected expression. As such, this court finds that defendant's pre-approval scheme operates as an unconstitutional prior restraint on speech.

Accordingly, to the extent that plaintiff's motion for partial summary judgment (#50) requested a finding that his art work is constitutionally protected and that defendant's pre-approval policy is unconstitutional, the motion is granted. To the extent plaintiff wanted the court to hold that all visual art is per se constitutionally protected, the motion is denied.

3. Motion for Partial Summary Judgment as to Victorian Square (#55)

Plaintiff also has moved for partial summary judgment with regard to Victorian Square (#55). As with his motion pertaining to Sparks's city parks, plaintiff contends that "[t]he material dispute between the parties centers on the following issue: Whether, as a pre-condition to White's selling his paintings in Victorian Square, [Sparks] may insist on reviewing them one by one to determine whether each painting offered for sale conveys a religious, political, philosophical or ideological message." (Pl.'s Mot. for Partial Summ. J. (#55) at 2 (internal quotations omitted).) Because both the court's refusal to find all visual art per se protected by the First Amendment and its decision that plaintiff's artwork satisfies the Ninth Circuit's standard for protected merchandise apply with equal force to this motion, here the court need only consider the constitutionality of Sparks's Victorian Square pre-approval scheme.

Under Sparks's Roadway and Sidewalk Vendors Ordinance, SMC § 5.59 et seq.,[6] it is "unlawful for any vendor to sell, display or offer for sale any food, beverage, goods, services or merchandise on the public streets or sidewalks or other city-owned property without first having obtained a permit in accordance with this chapter." SMC 5.59.020(A). According to defendant, this ordinance applies only to Victorian Square. (Opp'n (#58) at Ex. N.) Again, as with the ordinance prohibiting the sale of merchandise in Sparks's city parks, the city has in effect interlineated a caveat that this prohibition applies only to the sale of "unprotected goods or merchandise." (*Id.* at 7.) According to the city:

> it will allow an individual (e.g. Plaintiff), without obtaining a business license or Victorian Square Vendor's Permit, to sell (his or anyone else's) paintings in Victorian Square if the painting offered for sale conveys a religious, political, philosophical or ideological "message" and is intrinsically intertwined with a protected message the speaker is attempting to convey.

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[6] Again, the court only was asked to consider the constitutionality of Sparks's policy of excepting First Amendment protected speech from the application of this ordinance and the pre-approval scheme apparently created in order to implement that policy. The court was not asked to consider the constitutionality of the underlying ordinance without the interlineated policy. Accordingly, the court expresses no opinion as to whether this ordinance standing alone would pass constitutional muster.

(*Id.* at 7.) It seems that with regard to Victorian Square, the city's policy is somewhat more defined.[7] In order to sell protected work in Victorian Square, plaintiff would have to file an application with the city. (*Id.*) The City Manager then would appoint a committee of no fewer than three people to determine whether each painting conveys a "message." (*Id.*) The committee would consist of the Cultural Arts Coordinator, the City Attorney or an Assistant City Attorney, and an employee of the redevelopment agency. (*Id.*) The City Manager also could appoint additional people to the committee. (*Id.*) Once the committee made the determination that a painting or other item contains a qualifying message and therefore constitutes protected speech, then permission to sell in Victorian Square would be granted. (*Id.* at 27.) If, however, no qualifying message is found, the vendor could appeal to the City Manager. (*Id.*)

As for how the determination is made, defendant again explains that "whether goods or merchandise presents [*sic*] a religious, political, philosophical or ideological message is based on common sense and the plain meanings of the four categories." (*Id.* at 9.) The city acknowledges that "[t]here are no limiting criteria or standards, which could result in incorrect

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[7] Plaintiff, in his reply, notes that "[e]verything suggests that Sparks is making up its regulatory scheme as it goes along." (Reply (#62) at n. 1.) While the court would tend to agree, because plaintiff has moved for summary judgment on the existence of a policy for which there is no proof other than the statements advanced by the defendant in litigation, the court can only examine the policy and regulatory scheme as represented for purposes of determining its constitutionality.

determination," (*id.*) but does state that dictionary definitions of the words religious, political, philosophical, and ideological "provide reasonable, objective standards for governmental entities . . . to follow." (*Id.* at 26.) Sparks further claims that were it "to create additional standards, it would run the risk of unconstitutionally limiting the sale of expression in public fora." (*Id.*) However, the city does now recognize that it "must make a careful, but liberal, analysis of any 'message' presented by merchandise offered for sale, lest its conclusions be underinclusive and violative of 'free speech' rights." (*Id.*)

While Sparks, in opposition to this motion for partial summary judgment, has provided the court with more detail as to its pre-approval scheme, these details are insufficient to rehabilitate the scheme from the flaws outlined above. The city's concern that it not add any additional standards which might result in restricting protected speech will be taken as genuine; however, with nothing to guide its decision makers but a dictionary, the policy's risk of discriminatory enforcement is simply too high. This is amplified by the fact that, at least to the knowledge of the court, no written explanation, or guideline for enforcement of the policy even exists. Such unlimited discretion places an unconstitutional prior restraint on protected speech. Moreover, while defendant appears to be backing off from its excessively narrow interpretation of the Ninth Circuit's protected merchandise standard, it still insists that in order to be sold, an item must convey a message "that a reasonable person viewing the merchandise will be able to read and recognize . . . merely by observing the merchandise." (*Id.* at 23.) In fact, defendant claims that "[a] hidden or implied

'message' is no 'message' at all." (*Id.*) Because the Supreme Court in *Hurley* rejected any "particularized message" requirement, defendant's interpretation and application of the Ninth Circuit's protected merchandise standard operates as an unconstitutional prior restraint on speech.

Accordingly, to the extent that plaintiff's motion for partial summary judgment (#55) requested a finding that his artwork is constitutionally protected and that defendant's pre-approval policy is unconstitutional, the motion is granted. To the extent plaintiff wanted the court to hold that all visual art is per se constitutionally protected, the motion is denied.

III. *Conclusion*

Accordingly, **IT IS ORDERED** that defendant's motion to strike (#57) be *DENIED*.

IT IS FURTHER ORDERED that plaintiff's motion to strike (#60) be *DENIED* as moot.

IT IS FURTHER ORDERED that defendant's motion to strike (#63) be *DENIED* as moot.

IT IS FURTHER ORDERED that plaintiff's motion for partial summary judgment (#50) be *GRANTED* in part and *DENIED* in part.

IT IS FURTHER ORDERED that plaintiff's motion for partial summary judgment (#55) be *GRANTED* in part and *DENIED* in part.

DATED: This 5th day of August, 2004.

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-15582
D.C. No. CV-03-00251-DWH/RAM

[Filed December 4, 2007]

STEVEN C. WHITE,	)
	)
Plaintiff - Appellee,	)
	)
v.	)
	)
CITY OF SPARKS,	)
	)
Defendant - Appellant.	)
	)

ORDER

Before: B. FLETCHER and CLIFTON, Circuit Judges, and SHEA* District Judge.

* The Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

Judge Clifton has voted to deny the petition for rehearing en banc and Judges B. Fletcher and Shea so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is denied.

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(2)

No. 07-1132

FILED
MAR 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

CITY OF SPARKS,

Petitioner,

v.

STEVEN C. WHITE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Petition raises the following issue:

Are an artist's original paintings inherently expressive such that they are protected by the First Amendment, or must they communicate an obvious, particularized religious, political, philosophical or ideological message to merit First Amendment protection?

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Constitutional Provision:

U.S. Const. First Amendment ..... *passim*

STATEMENT OF THE CASE

The Court of Appeals for the Ninth Circuit accurately summarized the allegations related to petitioner City of Sparks's claim [Pet'r App. 2a-4a]. Briefly stated, Steven C. White is an itinerant artist who earns a living by setting up an easel on a city's sidewalks and in parks and selling his paintings to passersby who take an interest in his work. A painter of nature scenes on canvas, White believes his paintings convey, among other messages, the message that human beings are driving their spiritual brothers and sisters, the animals, into extinction. To White, his paintings are a vehicle for communicating a spiritual, holistic, naturalistic view of the universe.

The City of Sparks, Nevada, prohibits the sale of merchandise in its parks and limits sales in its redevelopment area known as Victorian Square to those vendors having permits. For those without vendor's permits, like White, Sparks has voluntarily made a limited exception allowing the display of artwork in these locations as well as the sale of items that have received pre-approval by city employees through a "First Amendment exception" to the vendor-permitting ordinances.

According to Sparks, to gain such pre-approval and thereby qualify for sale under its First Amendment exception, all items, including original paintings, must first be submitted to a "review committee" composed of city officials for a determination if the items convey an obvious religious, political, philosophical, or ideological message under Ninth Circuit precedent in

Gaudiya Vaishnava Society v. City and County of San Francisco, 952 F.2d 1059, 1063 (9th Cir. 1990), *cert. denied*, 504 U.S. 914, 112 S. Ct. 1951, 118 L. Ed. 2d 555 (1992) [Pet'r App. 3a].

Petitioner explains the committee review procedure:

> The committee makes a determination whether the merchandise carries or conveys a qualifying message in one or more of those four categories based on broad dictionary definitions of those words. . . . If the committee determines that the merchandise qualifies under *Gaudiya Vaishnava Society*, the merchandise can be sold in the city parks or Victorian Square without a business license or other permit, subject only to rules imposed on all other users [Pet'r Br. 3].

White brought a facial challenge to Sparks's vendor-permitting scheme and moved for partial summary judgment on the question whether he may sell his paintings on the same basis as he may display them, that is free of restraint—free of the requirement that he first submit his paintings to the review committee for a determination that his paintings contain a discernible religious, political, philosophical, or ideological message. He argued that his paintings are inherently expressive and need not communicate a particularized message to merit First Amendment protection. Sparks opposed White's motion on the ground that his paintings are mere

landscapes[1] that do not patently express a religious, political, philosophical, or ideological message [Pet'r App. 4a].

Agreeing for the most part with White, the district court granted him partial summary judgment to the extent he requested a ruling that his paintings expressed a message warranting First Amendment protection. The district court concluded that Sparks's pre-approval policy constituted an unconstitutional prior restraint because it failed to include objective criteria for the review committee's approving or rejecting a piece of artwork [Pet'r App. 4a]:

> The standard used by the city to determine whether particular goods or merchandise present "a religious, political, philosophical or ideological message is based on common sense and the plain meanings of the four categories." . . . According to defendant "[t]here are no limiting criteria or standards, which could result in incorrect determinations." As such, defendant in effect has conceded that its officials have nearly unbridled discretion in determining whether a particular work is protected by the First Amendment. Because the city has not delineated any objective standards, its officials could easily interpose their personal judgments in a manner inimical to the protection of First Amendment Rights [Pet'r App. 35a].

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[1] In the petition for certiorari, Sparks refers to White's paintings as "unexceptional nature scenes" [Pet'r Br. 2].

The Court of Appeals affirmed the district court's findings, narrowly and correctly deciding the purely legal issue. It rejected Sparks's argument that, to merit First Amendment protection, White's paintings must convey an "explicit or implicit but obvious" religious, political, philosophical, or ideological message [Pet'r App. 7a]. So finding, the Ninth Circuit cited established Supreme Court precedent:

> As the Court has explained, "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a particularized message would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll" [Pet'r App. 7a-8a (citing *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569, *115 S. Ct. 2338, 132 L. Ed. 2d 487* (1995))].

The Ninth Circuit's holding is neither new nor revolutionary. The court simply made crystal clear that original paintings have inherent expressive value: "So long as it is an artist's self-expression, a painting will be protected under the First Amendment because it expresses the artist's perspective" [Pet'r App. 7a].

Sparks's petition is deceptive on four levels: First, it raises a sham issue—whether the First Amendment "requires" a governmental entity to allow the sale of artistic creations constituting "speech" in the public fora to the same extent it must allow "pure speech" in the

public fora. It ignores that, of its own accord, Sparks created the "First Amendment exception" to its licensing scheme, permitting certain merchants and artists to display and sell their wares and artwork in the public fora without a vendor's permit. That decision having been made, the issue is whether Sparks may precondition White's right to sell his original paintings in the public fora on a determination by city officials that those paintings convey an obvious political, religious, philosophical or ideological message [Pet'r Br. 3]. White asserts that his paintings are "inherently expressive," that the First Amendment protects them without requiring that they convey a particularized message.

Second, in what Sparks calls a "golden opportunity," it invites this Court to develop a whole body of law, having nothing to do with the specifics of this case, redefining the scope of the First Amendment as applied to the sale of merchandise and artwork [Pet'r Br. 5].

Third, Sparks argues a split of authority within the circuits where none exists.

Fourth, Sparks attempts to mislead the Court by arguing in its "Questions Presented" that this case is about prints, photographs, digital images, sculptures, engravings, metal art, blown glass objects, and jewelry. This case is about an artist's original paintings. No other medium is involved. White maintains that his paintings are protected by the First Amendment, nothing further.

REASONS FOR DENYING THE PETITION

I.

THE APPELLATE PANEL PROPERLY UNDERSTOOD THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION IN *GAUDIYA* AND ITS DECISION IN THIS CASE

White prevailed before the district court. He prevailed by unanimous decision of a three-judge panel at the court of appeals. He prevailed in opposing Sparks's request for rehearing en banc without a single member of the Ninth Circuit requesting a vote on the matter [Pet'r App. 43a]. Not one amicus brief has been filed. This petition should be denied because both the district court and the appellate court correctly decided the case and there is no conflict among the circuits.

Petitioner attempts without success to draw a distinction between the Ninth Circuit's decision in *Gaudiya* and the decision in this case. None exists. *Gaudiya* and *White* complement each other; there is no conflict; they are in full accord.

In *Gaudiya*, the Ninth Circuit held that First Amendment protection extended to the "sale of merchandise which is inextricably intertwined with a statement carrying a religious, political, philosophical or ideological message." 952 F.2d at 1066. The "merchandise" at issue in *Gaudiya* was not paintings by original artists – but clothing, jewelry, and stuffed animals sold as fundraisers by charities and advocacy groups. *Gaudiya* was not about items that are inherently expressive, like paintings.

The ordinance challenged in *Gaudiya* specifically allowed the unrestricted "sale of books, pamphlets, buttons, bumperstickers, posters or any other type of item that has no intrinsic value other than to communicate a message" in the City and County of San Francisco. *Id.* at 1061 n.4. That part of the ordinance was never at issue. The issue before the court was whether the San Francisco could regulate the sale of intrinsically non-expressive merchandise, such as T-shirts, stuffed animals or jewelry, that contained a message-bearing statement expressing the beliefs of a nonprofit organization. *Id.* at 1061.

The Ninth Circuit held in *Gaudiya* that, when such non-expressive items were "inextricably intertwined" with religious, political, philosophical or ideological messages, they gained expressive value sufficient to merit First Amendment protection. *Id.* at 1066. Thus the T-shirts, coffee cups and other inherently non-expressive items at issue in *Gaudiya* could be sold in the designated public places along with inherently expressive items if they: (1) possessed a religious, political, philosophical, or ideological message; and (2) the message was "inextricably intertwined" with the item.

Distinguishing *Gaudiya*, the panel in *White* found that the merchandise at issue—clothing, jewelry, and stuffed animals—gained expressive value only when their sale was inextricably intertwined with pure speech. Hence a message like "Save the Wales" embroidered on a stuffed animal might be protected because, while the item (the stuffed animal) is not inherently expressive, it could be seen as "inextricably intertwined" with a political message. Accordingly, the

panel held, "To the extent that visual art is inherently expressive, the *Gaudiya* test is inapplicable." [Pet'r App. 6a]

Thus, the *Gaudiya* test is inapplicable to White's paintings because his paintings have no purpose beyond expression. Being inherently communicative and expressive, they do not require a particularized "message" to merit First Amendment protection. The *Gaudiya* "inextricably intertwined" message test applies only to items that have a practical purpose distinct from their communicative purpose, like T-shirts, coffee cups and the like. Accordingly, under *Gaudiya*, if an inherently non-expressive T-shirt carries a message such as "Save the Whales," or a coffee cup proclaims "Jesus Saves," it would merit First Amendment protection whereas the same T-shirt and coffee cup absent such messages would not.

Petitioner fails to grasp that inherently expressive items such as books, pamphlets, buttons, posters and other items with no intrinsic value beyond communication were not at issue and were not addressed in *Gaudiya*. *Gaudiya*'s test is inapplicable to those items—they were exempted in the ordinance under challenge in that case. Just so, *Gaudiya*'s test is inapplicable to White's original paintings, items like books, pamphlets and the like, that have no intrinsic value beyond their communicative purpose. *Id* at 1062:

In *White*, the panel simply expanded upon the logic of *Gaudiya*, correctly recognizing that original paintings are more akin to books, posters, and bumper stickers than coffee mugs or T-shirts. Its holding that original

paintings are "inherently expressive," is nothing new or startling – simply a restatement of old law, established precedent, and not in conflict with its prior holding in *Gaudiya*.

Throughout this litigation, petitioner has misread *Gaudiya*, incorrectly assuming that *Gaudiya* mandates that all merchandise must convey a discernible religious, political, philosophical, or ideological message to merit First Amendment protection. Petitioner fails to appreciate what the Ninth Circuit was actually doing in *Gaudiya*. It was setting up criteria for two types of items —first, those that are inherently expressive and require no particularized message to merit First Amendment protection; and, second, those that are not inherently expressive and do require a particularized, "inextricably intertwined" message to merit First Amendment protection.

Petitioner has for five years persistently and mistakenly argued that White's original paintings are no different than the clothing, jewelry, and other goods addressed in *Gaudiya*. Petitioner's misreading of *Gaudiya* has prompted it to argue the false proposition that all merchandise is to be treated alike for First Amendment purposes. From petitioner's perspective, paintings are no different from T-shirts, books no different from coffee cups, and posters no different from jewelry. According to petitioner, all items must contain a particularized, readily identifiable religious, political, philosophical, or ideological message to merit First Amendment protection.

Dismissive of White's paintings as "unexceptional nature scenes" [Pet'r Br. 2] and "meaningless" artistic expression [Pet'r Br. 19], petitioner fails to grasp the essential principle that White's paintings are communicative in their very nature and, as such, constitute expression protected by the First Amendment. The truism "art is in the eye of the beholder" means that different people see different things when observing artwork. While Sparks's officials may view White's paintings as "unexceptional" and "meaningless," to White and his patrons, they communicate volumes about the sanctity of nature and the need to protect diminishing wildlife.

The panel was unequivocal:

> Any artist's original painting holds potential to "affect public attitudes" by spurring thoughtful reflection in and discussion among its viewers. So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective [Pet'r App. 6a-7a (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, *72 S. Ct. 777, 96 L. Ed. 1098* (1952))].

Mastrovincenzo v. City of New York, 435 F.3d 78, 95-97 (2nd Cir. 2006), decided by the Second Circuit, is in accord. *Mastrovincenzo* addresses the tension between pure art (such as paintings, sculpture, prints and photography) and merchandise that has a purpose (such as apparel, coffee cups or jewelry). In *Mastrovincenzo*, the particular items addressed were hats and clothing

painted with graffiti.[2] The question posed was whether those items, not inherently communicative, gained First Amendment protection with the application of graffiti style paint. To answer the question, the Second Circuit—in complete synchronicity with *Gaudiya* and *White*—articulated a "dominant purpose" test. It held that, when an item's dominant purpose is expressive (such as with paintings, sculpture, prints, and photography), the vendor has a strong claim to First Amendment protection; conversely, when an item's dominant purpose is non-expressive (such as with graffiti hats, coffee cups, or jewelry), it will be classified as "mere commercial goods," the sale of which may be presumed to fall outside the scope of the First Amendment. The vendor of commercial goods does not necessarily have a claim to First Amendment protection. *Id.* at 95.

Both *Mastrovincenzo* and *Gaudiya* are clear: If an item's dominant or intrinsic purpose is expressive, then the item is entitled to First Amendment protection—end of story. It is only necessary to look deeper if the item's dominant or intrinsic purpose is not expressive. Because the dominant or intrinsic purpose of White's original paintings is expressive, under *Mastrovincenzo* as well as *Gaudiya*, there is no requirement of further analysis for them to merit First Amendment protection.

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[2] Petitioner incorrectly referenced *Mastrovincenzo* as addressing "graffiti styled paintings" [Pet'r Br. 11]. Hats, not paintings, were at issue in that case.

II.

THE APPELLATE PANEL PROPERLY CONSIDERED THAT THE ARTS, INCLUDING PAINTINGS, HAVE A PARTICULAR AND UNIQUE HISTORY OF PROTECTION BY THE SUPREME COURT

The United States Supreme Court has been clear that the arts and entertainment constitute protected forms of expression under the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 790, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (music without words); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65-66, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981) (dance); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (theater); *Miller v. California*, 413 U.S. 15, 34-35, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) ("serious literary, artistic, political, or scientific ideas," unless obscene); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S. Ct. 777, 96 L. Ed. 1098 (1952) (motion pictures).

The First Amendment shields far more than just written and spoken forms of expression. Expressive conduct found protected comes in many varieties. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (parades); *Gregory v. Chicago*, 394 U.S. 111, 112, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969) (peaceful and orderly marches); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (wearing of arm bands to express certain views); *Brown v. Louisiana*, 383 U.S.

131, 141-42, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966) (protest sit-ins); and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632-34, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (refusal to salute flag).

Against this backdrop, it is indisputable that White's self-expression through painting constitutes expression protected by the First Amendment. In painting, an artist conveys his sense of form, topic, and perspective—none of which necessarily consists of a narrow, explicit message. "A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with the 'unquestionably shielded painting of Jackson Pollock'" [Pet'r App. 6a (citing *Hurley*, 515 U.S. at 569)].

Just as the Supreme Court found in *Hurley* that Jackson Pollock's dribbles, paint squirts, and splotches are undeniably protected expression under the First Amendment, surely there can be no question that White's landscapes are equally protected. It does not matter if White's paintings are appealing or unappealing to the viewer, realistic or abstract. They are his expression, his ideas expressed through the medium of color, form and canvas. Even though Pollock's paintings fail to convey a readily discernible religious, political, philosophical or ideological message, there is no dispute that they merit the highest First Amendment protection.

Sparks's officials, armed only with a dictionary and whatever common sense they may possess, predictably would not be able neatly to characterize Pollock's work as conveying one of the four required categories of ideas.

Sparks's requirement that White (or Pollock should he apply) express an explicit or implicit, yet obvious, particularized idea in his paintings is far too restrictive. "[T]he Constitution looks beyond written or spoken words as mediums of expression. . . . [A] narrow, succinctly articulable message is *not* a condition of constitutional protection." *Hurley*, 515 U.S. at 569 (emphasis added). Indisputably, to merit First Amendment protection Pollock's paintings need not communicate a particular message, and neither do White's. Paintings, the unique expression of an artist, are protected as expressive communication without a required message readily discernable to dictionary toting officials.

While White does not claim to be a Pollock or Picasso, he is nonetheless an artist who creates paintings and seeks to display and sell them with their full measure of constitutional protection. There is no dispute that his original paintings are visual art and that they have no intrinsic value or purpose beyond their expression. Unlike T-shirts, cups and other merchandise that may incidentally contain a message of sorts, White's art is by its very nature expression, hence, deserving of constitutional protection.

III.

THE APPELLATE PANEL WAS CORRECT TO ALIGN ITS OPINION WITH THE SECOND, SIXTH, AND SEVENTH CIRCUITS—THERE NO SPLIT BETWEEN THE CIRCUITS ON WHETHER ORIGINAL PAINTINGS ARE PROTECTED BY THE FIRST AMENDMENT

There is no split between the circuits to warrant this Court's grant of certiorari. The circuits are in agreement. Not one court has held that original paintings are not protected under the First Amendment unless they convey a particularized message. Petitioner's assertion that the law in this area is in a "constant state of flux" [Pet'r Br. 6] is a false assertion. Instead of pointing out a legitimate split, petitioner points to a "dearth of decisions" [Pet'r Br. 7]. Petitioner has not identified a single case in conflict with a single other case.

Petitioner improperly requests this Court to grant certiorari, not because the circuits are divided, but because it is a "golden opportunity" to define the scope of the First Amendment and merchandise [Pet'r Br. 5]. This is an invalid reason to grant certiorari. In reaching its decision that the First Amendment protects an artist's original paintings, the panel in *White* specifically joined the three sister circuits that have addressed the issue. See *ETW Corp. v. Jireh Pub., Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (holding that "[t]he protection of the First Amendment . . . includes . . . music, pictures, films, photographs, paintings, drawings, engravings, prints, and sculptures"); *Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1251, 117 S. Ct.

2408, 138 L. Ed. 2d 174 (1997) (holding that "paintings, photographs, prints and sculptures ... always communicate some idea or concept to those who view it, and as such are entitled to full First Amendment protection"); and *Piarowski v. Ill. Cmty Coll. Dist.* 759 F.2d 625, 628-32 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007, 106 S. Ct. 528, 88 L. Ed. 2d 460 (1985) (holding that stained glass windows, as "art for art's sake," were protected under the First Amendment).

Though few circuits have addressed the issue straight on, no circuit has ever found that an artist's original paintings do not merit First Amendment protection.

IV.

SPARKS'S REVIEW COMMITTEE PROCEDURE CONSTITUTES CONTENT-BASED DISCRIMINATION AND AN UNCONSTITUTIONAL PRIOR RESTRAINT

Petitioner argues that Sparks's committee comprised of city employees is fully capable of observing White's paintings to determine whether they convey a "qualifying message" in one of the four categories required by *Gaudiya* [Pet'r Br. 3]. Petitioner asserts:

> Standard dictionary definitions of the words describing the four "core" categories (i.e., political, religious, philosophical, and ideological) could be used as a standard to limit the reviewer's discretion to ascertain whether merchandise falls into a "core" category. There

> would be no prior restraint because the discretion of the reviewers would be sufficiently limited by the dictionary definitions [Pet'r Br. 22].

Petitioner further argues that—even though city officials must first "physically observe" the merchandise to determine whether it conveys the required message—it would not evaluate the message's "content" but would merely determine the "presence or absence" of the message [Pet'r Br. 21].

The district court disagreed with petitioner's position, holding:

> [W]ith nothing to guide its decision makers but a dictionary, the policy's risk of discriminatory enforcement is simply too high. This is amplified by the fact that, at least to the knowledge of the court, no written explanation, or guideline for enforcement of the policy even exists. Such unlimited discretion places an unconstitutional prior restraint on protected speech [Pet'r App. 39a).

The district court was correct. Dictionary definitions of "religious, political, philosophical, and ideological" provide no guidance whatsoever to city officials, and they raise more questions and problems than they can possibly resolve. For example, how is the artist to depict philosophy in his painting? For his painting to convey a philosophical message, must it contain a portrait of or reference to a known philosopher—Confucius, Socrates, Sartre or Kant? What if the reviewing committee fails

to recognize the philosopher or philosophy? What if the committee's concept of a religious painting is limited to mainstream religions? While paintings of known religious icons may meet Sparks's standards, what is the committee to conclude about religious symbols that are more elusive or constitute a satire on religion? What if the reviewing committee fails to recognize certain religious icons or symbols and the message they may convey? What if the paintings convey different meanings to different people – how will Sparks's officials draw the line?

As for ideology, dictionaries define ideology as the "study of ideas." So how are city officials to recognize a painting that is of and about ideas? What is a painting of "ideas?" How certain can we be that city officials will recognize an ideological message when they see it? As for political messages, does White have to paint Washington crossing the Delaware or an important historical event to meet Sparks's requirement? Must he paint political figures or include a political slogan? Does Picasso's dove of peace merit First Amendment protection under Sparks's committee's review procedure? Or would city officials dismiss it as a mere "bird" in the same way they dismiss White's nature scenes as "meaningless" and "unexceptional," of no religious, political, philosophical, or ideological importance?

Both the district court and appellate panel appreciated what petitioner does not—that it is

impossible to apply such restrictive criteria to an artist's paintings:

> In painting, an artist conveys his sense of form, topic, and perspective. A painting may express a clear social position, as with Picasso's condemnation of the horrors of war in *Guernica*, or may express the artist's vision of movement and color, as with "the unquestionably shielded paintings of Jackson Pollock" [Pet'r App. 6a].

By insisting (1) that, in order to merit constitutional protection and qualify for Sparks's First Amendment exception to its vendor permit requirement, White's paintings must communicate a protected "core" message, and, (2) that Sparks's review committee must first examine the paintings to determine if their message is constitutionally protected, Sparks reveals a fundamental misunderstanding of content-based discrimination. By mandating that Spark's review committee examine White's paintings; physically observe them and determine their message, Sparks is necessarily discriminating based on content.

Content-based restrictions can stand only if they satisfy strict scrutiny. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000). They "must be narrowly tailored to promote a compelling Government interest." *Id.* They are presumptively invalid. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

A prior restraint exists when the enjoyment of protected expression is contingent upon the discretion of government officials—as by requiring a permit or license that may be granted or withheld in the discretion of such officials. *Staub v. City of Baxley*, 355 U.S. 313, 78 S. Ct. 277, 2 L. Ed. 2d 302 (1958); see also *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713, 51 S. Ct. 625, 75 L. Ed. 1357 (1931). In the area of free expression, a licensing restriction placing unbridled discretion in the hands of governmental officials risks censorship and constitutes a prior restraint. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

If Sparks city officials must first review White's paintings to determine if they convey a particular message, then the review process is content-based. See *Desert Outdoor Advertising v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996), *cert. denied*, 522 U.S. 912, 118 S. Ct. 294, 139 L. Ed. 2d 227 (1997). This is what content-based discrimination seeks to avoid – analysis of the content of the item itself. If a permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975) (citing *Cantwell v. Connecticut*, 310 U.S. 296, 305, 60 S. Ct. 900, 84 L. Ed. 1213 (1940)).

CONCLUSION

This is a simple case of petitioner's failure to comprehend the application of *Gaudiya* and other case precedent in the Ninth Circuit and elsewhere. For reasons stated, respondent White asks this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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